



April 10, 2018

Roxanne Rothschild  
Deputy Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570

RE: NLRB Representation Case Procedures Request for Information

Dear Ms. Rothchild,

The Center for American Progress Action Fund's American Worker Project opposes any action by the National Labor Relations Board to rescind or weaken election procedures in the union selection process.

The existing rules, adopted two years ago, represent modest and common-sense changes that helped to streamline the election process; reduce unnecessary litigation; and allow workers who want to form a union to vote in a timelier manner. Previously if employers decided to fight against a pro-union workers, it could take months, or even years, for workers who had petitioned for an election to get to a vote.

Under the new rules, the median number of days between an election petition being filed and the election being held is 23 days. This compares to a median of 38 days under the old rules.<sup>1</sup> And in elections where there is a contested case, the median wait time for an election fell from 59 days in Fiscal Year 2014 to 36 days in Fiscal Year 2017.<sup>2</sup>

Moreover, according to a study by John Paul Ferguson of Stanford University that analyzed over 22,000 representation drives occurring over a five-year period, too often elections didn't ever happen under the previous rules. Thirty-five percent of the time that workers filed a petition for an election the election did not end up happening, with workers withdrawing their petition, sometimes after a very long delay in trying to set up an election.<sup>3</sup> According to Ferguson's data, the average petition withdrawal occurred after 63 days of waiting for an election, and 5 percent of withdrawals occurred after 242 days.

While opponents of the Obama-era reforms claimed that the standardized process would hinder the ability of employers to explain their views to workers, this has not been the case. Companies, workers, and unions are now accustomed to operating under the new rules.

Employers and unions reach agreements in 92 percent of the petitions filed—the same percentage as before the amendments were adopted.<sup>4</sup>

Moreover, the NLRB election process—with its multiple steps—gives more than ample opportunity for employers and unions to educate workers. Indeed, research demonstrates that employers already communicate well before elections occur. Employers' views on unions are commonly incorporated into new-hire orientations according to numerous academic and advocacy group reports.<sup>5</sup> Even when employers don't start their campaigns upon hiring, their communications often start long before the filing of the petition.

Indeed, many of the amendments simply made the NLRB's rules simpler and easier for employees, union representatives, and employers to understand. And they modernized the NLRB's procedures by requiring electronic filing and other non-controversial, commonplace practices.

The NLRB adopted these election procedures after undertaking a more than three year review process and reviewing tens of thousands of comments. While corporate lobby groups have attempted to challenge the rules, courts have upheld the regulations finding that the agency "conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions."<sup>6</sup>

For these reasons, it is not surprising that Board members McFerran and Pearce have offered written dissents to this request for information. In her dissent, Member McFerran called the move "a transparent effort to manufacture a justification for revising the Rule."<sup>7</sup>

All workers deserve a fair and consistent process that enables them to make their own choices about whether to form a union. The existing rules are a modest but important improvement over previous regulations and have helped to make the union election process fairer. We urge the board to retain these commonsense protections.

Thank you for your consideration of these comments.

Sincerely,

Karla Walter  
American Worker Project  
Center for American Progress Action Fund

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<sup>1</sup> National Labor Relations Board, "Median Days from Petition to Election," available at <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (last accessed February 2018).

<sup>2</sup> Ibid.

<sup>3</sup> John-Paul Ferguson, "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999 – 2004," *Industrial and Labor Relations Review* 62 (1) (2008): 3-21, available at <http://digitalcommons.ilr.cornell.edu/ilrreview/vol62/iss1/1/> (last access February 2018).

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<sup>4</sup> National Labor Relations Board, “Percentage of Elections Conducted Pursuant to Election Agreements in FY17,” available at <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (last accessed February 2018).

<sup>5</sup> Gordon Lafer, “Neither Free Nor Fair: The Subversion of Democracy Under NLRB Elections” (Washington: American Rights at Work, 2007) available at <http://www.jwj.org/wp-content/uploads/2014/04/Neither-Free-Nor-Fair-FINAL.pdf>; John Logan, “Consultants, lawyers, and the ‘union free’ movement in the USA since the 1970s,” *Industrial Relations Journal* 33 (3) (2002): 200-201, available at: <http://www.jwj.org/wp-content/uploads/2014/03/Logan-Consultants.pdf>; and American Rights at Work, “Employer Communications on Unions Are Ongoing” (Washington: 2011) available at [http://www.jwj.org/wp-content/uploads/2014/01/employer\\_communication\\_on\\_unions.pdf](http://www.jwj.org/wp-content/uploads/2014/01/employer_communication_on_unions.pdf).

<sup>6</sup> See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215(5th Cir. 2015), affg. No. 1-15-CV-026 RP, 2015 WL 3609116(W.D. Tex. June 1, 2015). In addition, United States District Court Judge Amy Berman Jackson concluded that “...the Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the Final Rule, and it directly addressed the commenters’ many concerns...” in *Chamber of Commerce of U.S. v. NLRB*, 118 F.Supp.3d 171 (D.D.C. 015).

<sup>7</sup> National Labor Relations Board, “29 CFR Parts 101 and 102, RIN 3142-AA12, Representation Case Procedures Request for Information,” available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1718/Notice%20and%20Request%20for%20Information%20re%20Election%20Rule.pdf-AA> (last accessed February 2018).